

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EUGENE BRYE, JR.	:	DETERMINATION
	:	DTA NO. 818948
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 1995 through February 28, 1997.	:	

Petitioner, Eugene Brye, Jr., 2176 Light Street, Bronx, New York 10466, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1995 through February 28, 1997.

A small claims hearing was held before Brian L. Friedman, Presiding Officer, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York on May 8, 2003 at 9:15 A.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (John McCauley).

Since neither party elected to reserve time to file a brief, the three-month period for the issuance of this determination began as of the date the hearing was held.

ISSUE

Whether petitioner was a partner of K & B Flooring for the period January 23, 1996 through February 28, 1997 and, as such, personally liable, in accordance with Tax Law §§ 1131(1) and 1133(a), for payment of the taxes, penalties and interest due from the partnership.

FINDINGS OF FACT

1. On or about March 15, 1995, petitioner herein, Eugene Brye, Jr., together with his cousin Patricia A. King and her husband, Robert King, formed a partnership known as K & B Flooring. Petitioner and Mr. and Mrs. King were the general partners of the partnership with petitioner and Robert King each having a 40% interest in partnership profits and losses, while Patricia A. King held the remaining 20% interest in the partnership. K & B Flooring was primarily involved in the sanding, staining and refinishing of hardwood floors.

2. On March 13, 1996, K & B Flooring timely filed a sales and use tax return for the quarter ending February 29, 1996 reporting tax due of \$632.12. The check submitted in payment of the tax due as shown on the return was dishonored. On May 2, 1996, the partnership late filed its sales and use tax returns for the quarters ending May 31, 1995, August 31, 1995 and November 30, 1995 reporting tax due of \$447.00, \$759.00 and \$465.00, respectively. As of March 2, 1998, K & B Flooring had not filed sales and use tax returns for the four quarters ending May 31, 1996, August 31, 1996, November 30, 1996 and February 28, 1997.

3. On March 2, 1998, the Division of Taxation ("Division") issued eight assessments, four notices of determination and four estimated notices of determination, to petitioner asserting that as an "Officer/Responsible Person" of K & B Flooring he was personally liable for payment of the tax, penalty and interest due and owing from the partnership. The following table sets forth the amounts asserted due pursuant to the eight assessments:

QUARTER	TAX	INTEREST	PENALTY	TOTAL
05-31-1995	\$447.00	\$170.91	\$134.10	\$752.01
08-31-1995	\$759.00	\$258.95	\$227.70	\$1,245.65
11-30-1995	\$465.00	\$140.26	\$139.50	\$744.76
02-29-1996	\$632.12	\$166.69	\$189.61	\$988.42
05-31-1996	\$949.37	\$214.61	\$284.73	\$1,448.71
08-31-1996	\$949.37	\$179.94	\$256.26	\$1,385.57
11-30-1996	\$949.37	\$146.66	\$227.79	\$1,323.82
02-28-1997	\$949.37	\$114.71	\$199.32	\$1,263.40

The assessments for the first four quarters shown above were issued using the Notice of Determination form and assessed tax due in amounts equal to that which was reported as due and owing on the returns filed by K & B Flooring. The assessments for the last four quarters were estimated assessments made using the Notice of Estimated Determination form since the partnership had failed to file returns for these four quarters.

4. On November 4, 1999, a date subsequent to the issuance of the eight assessments noted above, K & B Flooring filed late sales and use tax returns for the quarters ending May 31, 1996, November 30, 1996 and February 28, 1997 reporting tax due of \$313.00, \$840.00 and \$0.00, respectively. In its Answer dated May 23, 2002, the Division has agreed to adjust the tax asserted due for the quarters ending May 31, 1996, November 30, 1996 and February 28, 1997 “to the unpaid tax reported on the respective returns that were later filed without remittance . . . ” i.e., \$263.00,¹ \$840.00 and \$0.00, respectively.

¹ For the quarter ending May 31, 1996 it appears that a payment of \$50.00 was made thus reducing the unpaid tax due from the \$313.00 reported on the return to the \$263.00 reflected in the Answer.

5. Petitioner was active in all aspects of K & B Flooring's business from the date it commenced operating on March 15, 1995, and he devoted all of his time and efforts to promoting and carrying on the partnership's business. However, by the end of 1995, petitioner came to believe that the partnership would not generate sufficient profits to adequately support all three partners. Effective January 23, 1996, petitioner withdrew from the partnership and by mutual agreement of all partners, the partnership was dissolved. After January 22, 1996, petitioner was not active in the partnership's day-to-day activities, had no control over financial or business decisions and did not share in its profits or losses. K & B Flooring continued operations solely under the control of the two remaining partners, Robert King and Patricia A. King, who have admitted that after January 22, 1996, they exercised complete and total control over every aspect of the partnership's activities.

6. Upon his separation from the partnership effective January 23, 1996, petitioner was employed at various jobs. Petitioner's personal income tax returns for the years 1996, 1997 and 1998 reflect that his sole source of income was derived from his employment activities and said returns do not report that he received any profits or losses from K & B Flooring.

7. The seven sales and use tax returns filed by K & B Flooring were signed by either Robert King or Patricia A. King.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) provides that "every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article." As relevant to this proceeding a person required to collect tax is defined in Tax Law § 1131(1) to include "any member of a partnership or limited liability company."

B. In the instant matter, petitioner does not dispute that he is properly considered as a person required to collect sales and use taxes on behalf of K & B Flooring from the date it commenced business, i.e., March 15, 1995, through January 22, 1996. However, petitioner maintains that he should not be held personally liable for any tax liability accrued after January 22, 1996 since he had withdrawn from the partnership as of this date, was no longer active in its day-to-day activities, did not have any control over business or financial matters and did not share in partnership profits or losses.

C. Partnership Law § 60 provides that “The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.” Here it is clear that after January 22, 1996 the partnership K & B Flooring was dissolved and that petitioner ceased to be associated with the carrying on of partnership business after this date. Partnership Law § 67(1) provides that “[T]he dissolution of the partnership does not of itself discharge the existing liability of any partner.” In *Matter of Vollgraff v. Block* (117 Misc 2d 489, 458 NYS2d 437) the Court concluded that “[P]artnership dissolution does not discharge a partner from obligations existing prior to dissolution, but only as to obligations arising after dissolution.” Since the sales and use tax liability incurred by K & B Flooring after January 22, 1996 was from the active conduct of business by a successor partnership, consisting of Robert King and Patricia A. King, and was not from the winding up of the business affairs of the dissolved partnership, petitioner is not liable for any sales and use taxes accrued after this date. Accordingly, petitioner is personally liable for the entire amount of sales and use taxes due for the quarters ending May 31, 1995, August 31, 1995 and November 30, 1995. For purposes of this determination, petitioner’s liability for taxes due for the quarter ending February 29, 1996 is determined to be \$368.16, which amount is

computed based on the number of days that petitioner was a partner (53 - December 1, 1995 to January 22, 1995) over the total number of days in the quarter (91 - December 1, 1995 to February 29, 1996) multiplied by the tax due for the entire quarter (\$632.12).

D. The petition of Eugene Brye is granted to the extent indicated in Conclusion of Law “C” and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
July 17, 2003

/s/ Brian L. Friedman
PRESIDING OFFICER